United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

74-2168

B
P/S

SUPPLEMENTAL BRIEF FOR AMICUS CURIAE
NATURAL RESOURCES DEFENSE COUNCIL

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2168

THE VERMONT NATURAL RESOURCES COUNCIL, ET AL.,

Plaintiffs-Appellants

v.

CLAUDE S. BRINEGAR, ET AL.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

J. G. SPETH
EDWARD L. STROHBEHN, JR.
Attorneys for Amicus Curiae
Natural Resources Defense Council
1710 N Street, N. W.
Washington, D. C. 20036

October 23, 1974

6

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-2168

THE VERMONT NATURAL RESCURCES COUNCIL, ET AL.,

Plaintiffs-Appellants

v.

CLAUDE S. BRINEGAR, ET AL.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

SUPPLEMENTAL BRIEF FOR AMICUS CURIAE
NATURAL RESOURCES DEFENSE COUNCIL

I. INTRODUCTION

One of the most important issues raised by this case is whether Section 505(a) of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. § 1365(a) -- the Citizen Suit Provision -- is the exclusive jurisdictional basis for claims which come within its terms. The District Court held that Section 505(a) is the exclusive basis of jurisdiction for such claims. Slip Op., at 30-32.

Amicus believes that this conclusion is seriously in error. We are deeply concerned with the far reaching consequences which would

occur if the District Court's FWPCA jurisdictional decision were affirmed, since it would significantly restrict the role that Congress intended citizens to have in the enforcement of the requirements of both the FWPCA[1] and the Clean Air Act, 42 U.S.C. §§ 1857h et seq., whose Citizen Suit provision was the model for the FWPCA provision and is essentially identical to it.[2] Moreover, such a decision would seriously impair the rights of citizens to seek relief from federal courts under other provisions of law for injury resulting from water or air pollution.

It is important to note as well that this Court's decision may be the first Court of Appeals opinion to treat this Citizen Suit jurisdictional issue directly and in detail. For these reasons, amicus believes that it is essential that the Court have before it a detailed discussion of the purpose and legislative history of Section 505. This Supplemental Brief provides the Court with this

---

1/ Congress stated explicitly in the FWPCA that public participation in the enforcement of the Act's requirements is to be "encouraged" and "provided for" by the Administrator. Section 101(e), FWPCA, 33 U.S.C. § 1251(e) (quoted at page 15, infra).

2/ See Sen. Comm. on Public Works (Library of Congress), A Legislative History of the Federal Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (Jan. 1973)(2 vols.), at 820, 1497 (hereafter "FWPCA Leg. Hist.").

The Clean Air Act Citizen Suit Provision is Section 304, 42 U.S.C. § 1857h-2.

information.[3]

II. SECTION 505(a) IS NOT THE EXCLUSIVE BASIS FOR JURISDICTION OF CLAIMS TO WHICH SECTION 505(a) APPLIES

In the discussion which follows amicus demonstrates that the basic purpose of Section 505 itself as well as the specific language of Section 505(e) and its legislative history all clearly show that Section 505(a) is not the exclusive jurisdictional basis for claims to which Section 505(a) applies. And this result has been specifically upheld by several U.S. District Court decisions.

A. The Purpose of Section 505.

It is important to emphasize at the outset that the basic purpose of Section 505 was to broaden the jurisdictional requirements for suits by citizens regarding the FWPCA in order to gain their assistance in enforcing the requirements of the Act.[4] Accordingly,

---

3/ In its principal brief, amicus curiae addressed the jurisdictional issue of the FWPCA claim primarily on the basis of the District Court's holding. The District Court specifically found that it had jurisdiction of the case under the federal question statute, 28 U.S.C. § 1331, see Slip Op., at 5, but determined that it lacked jurisdiction of the FWPCA Section 404 claim due to appellants' failure to comply with the 60-day notice requirement of Section 505(b), 33 U.S.C. § 1365(b), see Slip Op., at 30-32. Accordingly, amicus pointed out that Section 505(e) specifically preserves federal question jurisdiction of FWPCA claims and that a large number of courts have upheld this position. See Brief of Amicus Curiae, 11-15.

4/ See FWPCA Leg. Hist., at 220-21, 249, 819, 1306, 1497. As several of these references to the FWPCA legislative history state, the FWPCA Citizen Suit pr ision is modelled on a similar provision of the Clean Air Amend. nts of 1970, Section 304, 42 U.S.C. § 1857h-2.

[FOOTNOTE CONTINUED ON NEXT PAGE]

Section 505(e) preserves "any right which any person . . . may have under any statute . . . to seek any . . . relief (including relief against the Administrator . . .)." 33 U.S.C. § 1365(e)(emphasis added).

The essence of Section 505 is that rights created by the section are in addition to any rights to relief which a person otherwise has, and that such other rights are not restricted in any way by the requirements of Section 505(a) and (b). Nothing in the statute or the legislative history suggests that there was any intent to condition or otherwise affect rights citizens have under other laws.[5]

---

4 cont./ The debate regarding enactment of Section 304 was more extensive than that over Section 505, since adoption of Section 304 resolved many of the issues regarding broadening jurisdiction for citizens to bring suit to assist in enforcing environmental protection legislation. Therefore, the legislative history of Section 304 of the Clean Air Act is particularly relevant to Section 505 of the FWPCA.

Detailed discussion of the objectives of Section 304 is set out in the Senate Report on the bill, see Sen. Comm. on Public Works (Library of Congress), A Legislative History of the Clean Air Amendments of 1970, 93d Cong., 2d Sess. (Jan. 1974)(2 vols.), at 436-39 (hereafter "Air Leg. Hist."). In sum the central purpose of the provision was to broaden the right of citizens to bring suits to aid in enforcing the Act's requirements.

A statement by Senator Spong during Senate debate on the bill underscores this purpose:

> "We have carefully preserved the right of the public to participate in the pollution abatement process. In one significant respect, we have broadened that right. We have written into the bill a section authorizing citizens to bring suits on their own behalf to assure enforcement of standards, emission requirements, or implementation plants." Air Leg. Hist., at 262; and, to the same effect, see id., at 138, 387.

See also, id., at 127, 230, 349, 355-57.

5/ See the discussion of the legislative history regarding Section 505(e) of the FWPCA and of the essentially identical section of the Clean Air Act -- Section 304(e) -- which is presented at pages 10-12, infra.

Nor is there any indication that in enacting Section 505 Congress intended to preclude reliance on the jurisdictional bases for relief set forth in Title 28 of the United States Code, such as the federal question statute, 28 U.S.C. § 1331. The District Court's interpretation of Section 505 is at odds with this Congressional intent.

Moreover, if this Court should affirm the District Court's conclusion that Section 505(a) of the FWPCA is the exclusive basis for jurisdiction of claims involving failure of the Administrator to perform a nondiscretionary duty under the Act, extremely harsh results would follow. For example, if the Administrator failed to perform a mandatory duty under the FWPCA (which duty Congress made nondiscretionary because it considered it to be of paramount importance), and this failure caused a person irreparable injury, the person would first have to file an appropriate notice with the Administrator and then wait sixty days before he could file a legal action and seek preliminary relief. No matter how great the injury suffered, under the District Court's interpretation of Section 505(a), the person would be forced to wait 60 days before seeking judicial relief from failure of the Administrator to perform a mandatory duty.[6] Absent

---

6/ Two examples of persons suffering irreparable injury due to failure of the Administrator to perform a nondiscretionary duty are presented in Attachment 1 to this brief.

Ironically, under the District Court's interpretation of Section 505(a), if the Administrator in the exercise of his discretionary authority (which is concerned with matters of much less importance than the mandatory duties) abused his discretion and thereby caused a person irreparable injury, the person could immediately seek preliminary relief from a court. This occurs because discretionary actions of the Administrator are not within the scope of Section 505(a) and, therefore, relief would be available under other jurisdictional provisions.

clear evidence to the contrary -- and there is none -- it should not be presumed that Congress intended or sanctioned such harsh results.

In sum, if the District Court's decision regarding the exclusivity of Section 505(a) should be affirmed by this Court this result would preclude persons from ever obtaining preliminary relief for irreparable injuries caused by the Administrator's failure to perform his mandatory and most important duties under the FWPCA. As a result, the Court would affect the right of persons to rely on Title 28 of the U.S. Code and thereby deny persons whose claims meet the $10,000 jurisdictional amount requirement of the federal question statute, 28 U.S.C. § 1331, from obtaining immediate relief. Nothing in Section 505 itself or in its legislative history suggests that Congress intended to deny persons from seeking relief under this statute, or any other statute, as long as the jurisdictional requirements of these other statutes were met, such as the $10,000 requirement of 28 U.S.C. § 1331, which, it should be noted, is not a requirement of Section 505(a).

B. The Language of Section 505(e).

The conclusion -- that Section 505 provides persons with an additional basis for relief and does not limit, restrict, or otherwise affect any other rights to relief -- follows directly from the specific language of Section 505(e):

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a state agency)."
> 33 U.S.C. § 1365(e).

Section 505(e) explicitly applies to any claim which any person may have against the Administrator, whether for failure to perform a mandatory duty or for an abuse of discretion.

Contrary to the plain language of Section 505(e), however, the District Court's conclusion regarding the exclusivity of Section 505(a) would require insertion of an exception in Section 505(e) so that it would read [inserted language is underlined]:

> "Nothing in this section shall restrict any right, except those rights to which Section 505(a) applies, which any person . . . ."

Clearly, if Congress had intended for Section 505(a) to be the exclusive basis of relief for actions which are within its terms, Congress would have explicitly stated this exception in Section 505(e).[7]

In determining whether Congress has intended to limit judicial review, the rule of statutory interpretation to be followed has been established by the Supreme Court in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). In Abbott, the Court stated: "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose

---

7/ For example, exceptions to Section 505(b) are stated explicitly in that subsection and were the subject of specific consideration and revision during the legislative process. See FWPCA Leg. Hist., at 1498, 820, 328-29, 220.

In addition, the legislative history of Section 505(e) of the FWPCA and of Section 304(e) of the Clean Air Act, which is essentially identical to Section 505(e), demonstrates that Congress clearly intended to preserve all rights to relief which any person has under any statute, without exception. See the detailed discussion of the legislative history at pages 10-12, infra.

of Congress." Id., at 140. And the Supreme Court noted that enactment of the Administrative Procedure Act

> "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(a)." Id., at 140. (emphasis added)

Abbott involved pre-enforcement judicial review of agency action. In opposing such review, the government could not cite any explicit statutory authority denying such review. Instead, the government contended that because Congress explicitly granted pre-enforcement review for "certain enumerated kinds of regulations, . . . other types were necessarily meant to be excluded from any pre-enforcement review." Id., at 141. The Court rejected the government's argument and held:

> "[A] study of the legislative history shows rather conclusively that the specific review provisions were designed to give an additional remedy and not to cut down more traditional channels of review." Id., at 142.

That is just the case here. Not only is there abundant evidence that Section 505 was intended to provide citizens an additional remedy, but also Section 505(e) itself explicitly preserves "more traditional channels of review."

In sum, nothing in Section 505(e) suggests that it applies only to discretionary actions of the Administrator or only to pre-existing rights which a person had prior to enactment of the FWPCA. In fact, just the contrary is true.

First, Section 505(e) preserves any right which a person may have "to seek enforcement of any effluent standard or limitation." 33 U.S.C. § 1365(e). Section 309 of the Act mandates that the Administrator shall enforce violations of effluent standards or limitations if States fail to bring appropriate enforcement actions; in such cases

> "the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring civil action in accordance with [Section 309(b)]."[8] 33 U.S.C. § 1319(a)(1).

Thus, failure of the Administrator to perform nondiscretionary acts are specifically within the scope of the Section 505(e) and, accordingly, are subject to citizen suit "under any statute." 33 U.S.C. § 1365(e).

Second, use of the phrase -- "relief against the Administrator" -- in Section 505(e) makes clear that the Section applies to any actions of the Administrator under the FWPCA, and not just to actions based on rights pre-existing the FWPCA. It was this Act which established the Administrator as the responsible authority under the FWPCA,

---

8/ The legislative history confirms the mandatory nature of the enforcement requirement imposed on the Administrator by Section 309. During final debate on the Conference Report, Senator Muskie, principal author of the FWPCA, stated:

> "The Administrator must issue an abatement order whenever there is a violation of the terms or conditions of a permit, including the effluent limitations, time schedules, and monitoring requirements. Should he fail to issue an order, a citizen suit may be brought against him to direct the issuance of such an order." FWPCA Leg. Hist., at 163.

See also FWPCA Leg. Hist., at 174, 314-15, 801-03, 1331, 1481-83.

Section 101(d), 33 U.S.C. § 1251(d), and if the phrase "relief against the Administrator" in Section 505(e) is to have any substantive content, the need for such relief must arise from actions of the Administrator under the FWPCA.

C. The Legislative History of Section 505(e).

The legislative history of Section 304(e) of the Clean Air Act, which was the model for Section 505(e) of the FWPCA and which is identical to Section 505(e) in all essential respects, corroborates completely the interpretation of Section 505 which amicus advocates here -- that Congress intended in Section 505 to preserve all rights to relief which a person has under any statute without any limitation or restriction. This is seen by comparing the initial language of the provision, which was contained in the Senate bill, with that of the final bill as well as the statements in the Senate and Conference Reports which explain the purpose of the provision.

In its original form, Section 304(e) was Section 304(a)(2) of the Senate bill, and read as follows:

> "Nothing in this section shall affect the right of such persons as a class or as individuals under any other law to seek enforcement of such standards or any other relief." Air Leg. Hist., at 523, 614.

The Senate Report stated the purpose of this provision as follows:

> "The section does not, however, affect in any way whatever remedies such citizens or class of citizens might have under statutory or other law, nor does it provide for damage or nuisance actions."
> Air Leg. Hist., at 465 (Section-by-Section Analysis, Sen. Rpt. No. 91-1196, 91st Cong., 2d Sess.)

> "There would be no jurisdictional amount required in Section 304 nor is there any provision for the recovery of property or personal damages. It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with standards under this Act would not be a defense to a common law action for pollution damages."
> Air Leg. Hist., at 438 (Discussion of Intent, Sen. Rpt. No. 91-1196, 91st Cong., 2d Sess.)

Section 304(a)(2) was amended in Conference and became Section 304(e), in which form it was enacted into law. Section 304(e) reads as follows:

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."
> Air Leg. Hist., at 183.

As relevant to this case, the pertinent changes made in Section 304(a)(2) by the Conference are three:

(1) the phrase "Nothing . . . shall affect the right of such persons" was changed to read "Nothing . . . shall restrict any right which any person;"

(2) the phrase "under any other law" was changed to read "under any statute or common law;" and

(3) the phrase "any other relief" was expanded to read "any other relief (including relief against the Administrator . . .)."

In discussing these changes, the House Managers first described the original Senate bill as providing that "[o]ther rights to seek

enforcement of standards under other provisions of law were not affected." (emphasis added). Then, the House Managers described the conference substitute (which became law) as providing that "[t]he right of persons (or class or persons) to seek enforcement or other relief under any statute or common law is not affected." (emphasis added).

In sum, Congress was specifically concerned that Section 304 not restrict or limit in any way any rights which persons have to seek relief, including relief against the Administrator, under any statute and amended the savings provision -- Section 304(e) -- during the legislative process to ensure this result. Then, in drafting the savings provision for the FWPCA -- Section 505(e) -- the Senate simply copied Section 304(e) changing only the word "emission" to "effluent."[9]

D. The U.S. District Court Decisions.

Several U.S. District Courts have specifically upheld federal court jurisdiction under statutes other than Section 505(a) of claims which allege failure of the Administrator to perform nondiscretionary duties under the FWPCA.

9/ In its "Discussion of Intent," the Senate Report on the FWPCA states: "It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages." FWPCA Leg. Hist., at 1499. As the context makes clear, the use of the phrase "other law" in the Senate Report refers to all laws, including jurisdictional and substantive statutes and the common law.

Thus, in the case of NRDC v. Quarles, Civ. Dkt. No. 1629-73 (D.D.C.), EPA argued, as it has in this case, that Section 505(a) provides the exclusive basis for relief. The District Court for this Circuit rejected these arguments when it held as follows:

> "An extensive discussion [regarding jurisdiction] is unnecessary since jurisdiction exists by virtue of 28 U.S.C. § 1331 (1970). The complaint clearly raises a question which arises under a law of the United States, namely the Federal Water Pollution Control Amendments of 1972, 33 U.S.C. § 1342(a), 1345. The amount in controversy exceeds ten thousand dollars, exclusive of costs and interest, whether measured by the value of the rights asserted by plaintiff or by the cost of compliance by defendants if plaintiff prevails on the merits." [The District Court's opinion is attached to this Supplemental Brief as Attachment No. 2]

District court jurisdiction was also upheld in three cases in which it was alleged that the Administrator had failed to perform a nondiscretionary duty under Section 205 of the FWPCA, 33 U.S.C. § 1285, to allot all funds appropriated by Congress for construction of waste treatment facilities and in which jurisdiction was alleged only under statutes other than Section 505(a). Thus, in New York City v. Ruckelshaus, 5 ERC 1305 (D.D.C. 1973)(Civ. Dkt. No. 2466-72), aff'd ____ U.S. App. D.C. ____, 494 F.2d 1033, 6 ERC 1177 (D.C. Cir. 1974), the complaint specifically alleged that "[t]his action is brought pursuant to Section 505(e) of the Act, 5 U.S.C. §§ 701-706, and 28 U.S.C. §§ 1361, 2201," (emphasis added), and alleged that the District Court had jurisdiction of the action under 28 U.S.C. §§ 1331, 1332, 1361 and a provision of the District of Columbia Code. Jurisdiction under

Section 505(a) was not alleged.[10]

In Campaign Clean Water v. Ruckelshaus, 5 ERC 1441 (E.D.Va.), remanded with instructions, 6 ERC 1104 (4th Cir. 1973), jurisdiction was alleged only under 28 U.S.C. §§ 1331 and 1361. See 5 ERC 1441. And in Minnesota v. EPA, 5 ERC 1586 (D. Minn. 1973), jurisdiction was alleged only under the Administrative Procedure Act, 5 U.S.C. § 702(a), and under 28 U.S.C. §§ 1331 & 1361. See 5 ERC 1587. Finally, district court jurisdiction was found in a case involving a similar claim as the three cases discussed above and in which no jurisdictional allegation is reported in the opinion. Texas v. Fri, 5 ERC 2021 (W.D. Tex. 1973).

Similarly, in a case which involved the failure of the Administrator to perform a nondiscretionary duty under the Clean Air Act, the District Court found that the plaintiffs had not met the jurisdictional requirements of Section 304(a) (which was the model for Section 505(a) of the FWPCA) and then specifically upheld District Court jurisdiction under 28 U.S.C. §§ 1331 & 1361.[11] City of Highland Park v. Train, ____ F. Supp. ____, 6 ERC 1464, 1470&n.15, 1471

10/ In the original opinion, the District Court stated that "[t]he action is brought pursuant to § 505(a) of the Act . . . ." 5 ERC 1305. This was a typographical error that the Court corrected by order of May 17, 1973, in which it directed that "§ 505(a)" be changed to read "§ 505(e)." See Order of May 17, 1973, New York City v. Ruckelshaus, Civ. Dkt. No. 2466-72.

11/ The court dismissed the case on the merits, however, for failure to state a claim upon which relief could be granted. Id.

(N.D. Ill., Mar. 15, 1974).

In sum, U.S. District Courts have upheld on numerous occasions the rights of citizens to bring suit against the Administrator under statutes other than Sections 505(a) or 304(a) and subject only to the jurisdictional requirements of these other statutes in cases in which it was alleged that the Administrator had failed to perform a nondiscretionary duty under the FWPCA or, its model, the Clean Air Act.

E. Conclusion.

The District Court's decision regarding the exclusivity of Section 505(a) is inconsistent with the basic purpose of Section 505, with the explicit language of Section 505(e) and its legislative history, and with the several U.S. District Court decisions discussed above. If the District Court's decision were affirmed by this Court, this result would totally preclude citizens from bringing suits under statutes other than Section 505(a) for claims to which Section 505(a) applies. This result would substantially restrict citizens from assisting in enforcing the Act's requirements -- a result which directly conflicts with the basic purpose of Section 505 and is wholly contrary to a basic objective of the FWPCA:

> "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States . . . ." Section 101(e), 33 U.S.C. § 1251(e).

Respectfully submitted,

EDWARD L. STROHBEHN, JR.
J. G. SPETH
Attorneys for Amicus Curiae
Natural Resources Defense Council, Inc.
1710 N Street, N. W.
Washington, D. C. 20036
(202) 783-5710

Dated: October 23, 1974

ATTACHMENT 1

Examples of Cases

Two examples of cases in which persons would suffer irreparable injury from a failure of the Administrator to perform a mandatory duty under the FWPCA and the Clean Air Act are presented below.

A. FWPCA

Section 205 of the FWPCA, 33 U.S.C. § 1285, directs that the Administrator "shall" allot to the states for the construction of publicly owned treatment works "[s]ums authorized to be appropriated" under Section 207, 33 U.S.C. § 1287 (which sums amount to a total of $18 billion) "not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized . . . ." Congress was concerned that each state know at least six months in advance exactly how much money it would receive for the construction of publicly owned treatment works so that there would be adequate time for planning the construction of these multi-million dollar facilities. If the Administrator should fail to allot the required sums, the states and municipalities as well as their residents would suffer irreparable injury amounting to hundreds of millions of dollars in lost funds and unconstructed treatment works. And if the Administrator should fail to act in timely fashion, states, municipalities, and their residents would suffer substantial injury due to such factors as lost planning time, inadequately utilized resources, delayed construction. The states and municipalities and their residents should not be forced to suffer significant additional injury, which would probably amount to millions of dollars, while waiting for 60 days to pass before they could seek relief from the courts; but this result would be required by the District Court's

decision regarding the exclusivity of Section 505(a) of the FWPCA.

And, in fact, as set out in the brief at pages 12-15, at least three U.S. District Courts* have upheld federal court jurisdiction of claims against the Administrator for failure to perform his mandatory duty as required by Section 205 under jurisdictional provisions other than Section 505(a). In all of these cases, the substantial injury caused by the Administrator's failure to act are set out in the opinions, with particular emphasis placed on the injuries related to planning. Thus, for example, in New York City v. Ruckelshaus, 5 ERC 1307 (D.D.C. 1973), the court stated:

> "the reduction in allotments has resulted in serious planning delays that will necessarily retard the development of sewage treatment facilities . . . . The seriousness of the planning problem was understood by Congress. It was one of the reasons for utilizing the device of allotment . . . ." Id, at 1307

The court also found that another injury suffered by plaintiff was "the permanent loss of funds" if they were not allotted at the appropriate time. Id.

And in Campaign Clean Water v. Ruckelshaus, 5 ERC 1441 (E.D. Va. 1973), the court found that individual state residents suffered direct pecuniary injury from the Administrator's failure to perform his mandatory allotment duty under Section 205. Id., at 1442.

---

* These three cases are New York City v. Ruckelshaus, 5 ERC 1305 (D.D.C. 1973), aff'd, __ U.S. App. D.C. __, 494 F.2d 1033, 6 ERC 1177 (D.C. Cir. 1974); Campaign Clean Water v. Ruckelshaus, 5 ERC 1441 (E.D. Va.), remanded with instructions, 6 ERC 1104 (4th Cr. 1974); Minnesota v. EPA, 5 ERC 1586 (D. Minn. 1973). The Court of Appeals in New York City v. Ruckelshaus, supra, listed 9 cases which had been filed as of Dec. 12, 1973, regarding this issue.

B. Clean Air Act

Section 206 of the Clean Air Act, 42 U.S.C. § 1857f-5, directs that the Administrator "shall issue a certificate of conformity" for new motor vehicles or engines which conform with regulations required to be issued under Section 202 of the Act. 42 U.S.C. § 1857f-1. The issuance of this certificate is often the last step that occurs before production of the new cars is instituted by a manufacturer. If the Administrator should unlawfully fail to issue the certificate when the requirements of the Clean Air Act and the relevant regulations have been met, the manufacturer should not have to wait 60 days to challenge this unlawful act, which delay might force him to halt production and lay off workers, thereby causing substantial irreparable injury. However, this result would be required by the District Court's decision regarding the exclusivity of Section 505(a) of the FWPCA, which provision is essentially identical to the Citizen Suit provision of the Clean Air Act, Section 304, 42 U.S.C. § 1857h-2.

ATTACHMENT 2

Order of Feb. 1, 1974, in
Natural Resources Defense Council, Inc. v. Quarles, et al.,
____ F. Supp. ____ (Civil No. 1629-73, D.D.C. Feb. 1, 1974).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Plaintiff,

v.

JOHN R. QUARLES, JR.,
Acting Administrator
Environmental Protection Agency

and

ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Civil Action No. 1629-73

ORDER

This matter came before the Court on defendants' motion to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted. By Order of December 21, 1973, this Court stayed discovery by plaintiff pending disposition of the jurisdictional and standing issues raised by defendants' motion to dismiss.

Plaintiff raises numerous grounds in support of this Court's jurisdiction. An extensive discussion is unnecessary since jurisdiction exists by virtue of 28 U.S.C. § 1331 (1970). The complaint clearly raises a question which arises under a law

of the United States, namely the Federal Water Pollution Control Amendments of 1972, 33 U.S.C. § 1342(a), 1345. The amount in controversy exceeds ten thousand dollars, exclusive of costs and interest, whether measured by the value of the rights asserted by plaintiff or by the cost of compliance by defendants if plaintiff prevails on the merits. Contrary to defendants' assertions, sovereign immunity does not raise a bar to this court's jurisdiction.

Defendants also argue that plaintiff lacks standing to maintain this action. It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. See United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972). The organization has standing if it alleges that its members have suffered an injury in fact. Id. The Complaint in the instant case specifically alleges that plaintiff's members have suffered and will continue to suffer a specific and perceptible harm as a result of defendants' actions. It is of no consequence that the injury suffered by plaintiff's members may be shared by many individuals. United States v. Students Challenging Regulatory Agency Procedures, supra.

Upon the foregoing, it is this 1st day of February, 1974,

ORDERED that defendants' motion to dismiss be, and the same hereby is, denied.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the Motion for Leave to File Supplemental Brief for Amicus Curiae Natural Resources Defense Council and the Supplemental Brief for Amicus Curiae Natural Resources Defense Council in the case of The Vermont Natural Resources Council, et al. v. Claude S. Brinegar, et al., No. 74-2168, to be delivered to the persons noted below in the manner indicated:

1. By hand delivery to Edmund B. Clark, Esq., Land and Natural Resources Division, Room 2339, U.S. Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530, attorney for Appellee;

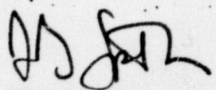
2. By deposit in the United States mail, postage prepaid, properly addressed, airmail and special delivery, to:

(a) Harvey Carter, Esq.
115 Elm Street
Bennington, Vermont

(b) William B. Gray, Esq.
U.S. Attorney's Office
Federal Building
Rutland, Vermont

(c) Edward Zuccaro, Esq.
Attorney-at-Law
St. Johnsbury, Vermont

(d) Robert C. Schwartz, Esq.
Commissioner's Office
Department of Highways
Montpelier, Vermont



J.G. Speth

Natural Resources Defense Council
1710 N Street, N.W.
Washington, D.C. 20036
(202) 783-5710
Attorney for Amicus Curiae

Dated: October 23, 1974